Supreme Court, U. S.
FILED
NOV 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-726

CLARENCE H. BENNETT, et al.,

Petitioners,

v.

GILBERT KIGGINS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

ELLSWORTH T. SIMPSON
Bowen Building - Suite 500
815 Fifteenth Street, N.W.
(202) 393-2244 Wash. D.C.

Attorney for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

CLARENCE H. BENNETT, et al.,

Petitioners,

v.

GILBERT KIGGINS, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Clarence H. Bennett, Dorothy G. Bennett and National Standards Association, Inc., petitioners herein, pray that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals, affirming the trial court's denial of petitioners' Motion for Relief from Judgment.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (App. A, infra.) is reported at *Bennett v. Kiggins*, ____ A. 2d ____ (D.C. App. 1978). The opinion of the Superior Court for the District of Columbia (App. B, infra.) is unreported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on August 10, 1978. The jurisdiction of this court is invoked pursuant to 28 U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED

1. Where original depositions were filed and paid for by Petitioners as required by the trial court's rules, does the entry of judgment, without a hearing, taxing costs of *copies* of such depositions against Petitioners constitute a denial of due process in violation of the 5th and 14 Amendments to the United States Constitution?

2. Where originals of depositions were not filed by Respondents in the trial court, may that court, nevertheless, enter a judgment without a hearing, taxing costs of such unfiled depositions against Petitioners without violating the due process provisions of the 5th and 14th Amendments to the United States Constitution?

LAWS AND COURT RULE INVOLVED
CONSTITUTION OF THE U.S.

(Amendment V)

(Rights of Accused in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Amendment XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DISTRICT OF COLUMBIA COURT OF APPEALS
RULE 54(d)

COSTS. Except when express provision therefor is made either in an applicable statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, the District of Columbia, or officers and agencies of either shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

RULE 54-I(b)

COSTS OF DEPOSITIONS, TRANSCRIPTS, AND BONDS. Costs of depositions, reporters' transcripts on appeal, and premiums on bonds may be taxed at the discretion of the trial court.

STATEMENT OF THE CASE

On February 22, 1974, Petitioners filed suit against Respondents, alleging misrepresentation in securities transactions. After discovery, the trial court granted Respondents' Motion for Summary Judgment; on appeal, the District of Columbia Court of Appeals affirmed; certiorari denied January 16, 1978.

Petitioners, C. H. Bennett and Dorothy G. Bennett, husband and wife, are residents of the State of Maryland; National Standards Association, Inc., is a corporation organized under the laws of the State of Maryland.

By letter of October 4, 1977, Respondents informed Petitioners that, "costs taxed to Plaintiffs, come to $740.25." (App. C, infra.) From October 13, 1977 to October 20, 1977 inclusive, Petitioners attempted to secure from Respondents an intemization of such costs. (App. D, infra.) By letter of October 17, 1977, Respondents advised that costs were "fully itemized and also notarized." (App. E, infra.) On the 19th day of October, 1977, without a hearing, Respondents obtained a judgment for costs against Petitioners. (App. F, infra.)

On October 25, 1977, six days after entry of judgment against Petitioners, Respondents forwarded to Petitioners photocopies of court reporters' invoices, representing charges for supplying copies of depositions to Respondents' counsel. (App. G, infra.)

Of the total costs of $740.25, the sum of $166.95 represents the costs of depositions taken by Respondents, but not filed in the trial court. On November 10, 1977, Petitioners filed a Motion for Relief from Judgment. (App. H, infra.)

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

On appeal to the District of Columbia Court of Appeals [court below] Petitioners presented the following issues:

1. Did the failure to provide appellants with one day's notice, in taxing costs, as required by Rule 54(d) of the Rules of Civil Procedure for the Superior Court of the District of Columbia, constitute a denial of due process of law?

2. Did the notification of taxing of costs, after assessment thereof against appellants, constitute denial of due process of law?

3. In the absence of a hearing and without the presentation of evidence establishing that copies of depositions were "necessarily obtained by appellees" did the taxing, as costs, of appellees' expenses in ordering such copies constitute the taking of appellants' property without due process of law?

In deciding the question of entry of judgment without a hearing, the court below equated Respondents' unofficial notification of its intention to tax costs against Petitioners with the Clerk of the Court's duty to provide one day's notice as required by the trial court's rules; relying on this premise the court below then ruled that Petitioners should have pursued a remedy which, as a matter of law, was unavailable to Petitioners. In brief, until the Clerk had served notice in compliance with Rule 54(d) of the court's rules, Petitioners were without any legal basis upon which to proceed in opposing Respondents' efforts to tax costs of copies of depositions. In any event, it is undisputed that judgment was entered against Petitioners without a hearing, in violation of the 5th and 14th Amendments to the United States Constitution.

REASONS FOR GRANTING WRIT

I.

The court below decided a federal question of substance not in accordance with applicable decisions of this court.

The facts in this case establish that the Clerk of the trial court did not give Petitioners the one day's notice, as required by Rule 54(d) of the court's rules. It is equally clear that a judgment was entered against Petitioners without a hearing. The case of *Armstrong v. Manzo*, 380 US 545, 552, 14 L.Ed 2d 62, 66, 85 S. Ct. 1187, holds that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful man-

ner." Therefore, even assuming the giving of one day's notice by the Clerk of the Court, considerable doubt arises that the requirement of due process was satisfied in this instance.

In *Fuentes v. Shevin* 407 US 67, 32 L.Ed. 556, 92 S. Ct. 1983, this court said:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Citing Baldwin v. Hale, 68 US 223, 233, 17 L Ed 531, 534. See Windsor v. McVeigh, 93 US 274, 23 L Ed 914; Hovey v. Elliott, 167 US 409, 42 L Ed 215, 17 S Ct 841; Grannis v. Ordean, 234 US 385, 58 L Ed 1363, 23 Ct 779.
>
> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment — to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party.
>
> ***
>
> It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Citing Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 170-172, 95 L Ed 817, 853, 854, 71 S Ct 624 (Frankfurter, J., concurring).
>
> ***
>
> The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth

> Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," citing Mullane v. Central Hanover Tr. Co., 339 US 306, 313, 94 L Ed 865, 872, 70 S Ct 652, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," Boddie v. Connecticut, 401 US 371, 378, 28 L Ed 2d 113, 119, 91 S Ct 780, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. E.G., Bell v. Burson, 402 US 535, 542, 29 L Ed 2d 90, 96, 91 S Ct 1586; Wisconsin v. Constantineau, 400 US 433, 437, 27 L Ed 2d 515, 519, 91 S Ct 507; Goldberg v. Kelly, 397 US 254, 25 L Ed 2d 287, 90 S Ct 1111; Armstrong v. Manzo, 380 US at 551, 14 L Ed 2d at 66; Mullane v. Central Hanover Tr. Co., supra, at 313, 94 L Ed at 872; Opp Cotton Mills v. Administrator, 312 US 126, 152-153, 85 L Ed 624, 639, 640, 61 S Ct 524; United States v. Illinois Central R. Co., 291 US 457, 463, 78 L Ed 909, 917, 54 S Ct 471; Londoner v. City & County of Denver, 210 US 373, 385-386, 52 L Ed 1103, 1112, 28 S Ct 708. See In re Ruffalo, 390 US 544, 550-551, 20 L Ed 2d 117, 121, 122, 88 S Ct 1222. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, supra, at 378-379, 28 L Ed 2d at 119 (emphasis in original).
>
> ***
>
> The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." Coe v.

Armour Fertilizer Works, 237 US 413, 424, 59 L Ed 1027, 1032, 35 S Ct 625.

Assuming arguendo, that copies of depositions were properly taxable, Petitioners cannot be denied a hearing prior to judgment. As to the elementary and fundamental requirements of due process, this Court, in *Mullane v. Central Hanover Trust Company,* 339 US 306, had this to say:

> Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 US 385, 394.

Other language in *Mullane v. Central Hanover Trust Co.,* supra, is quoted verbatim herewith:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, citing Milliken v. Meyer, 311 US 457; Grannis v. Ordean, 234 US 385; Priest v. Las Vegas, 232 US 604; Roller v. Holly, 176 US 398.

II

The court below has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

III

Certiorari should be granted to review an issue involving a judgment entered against Petitioners in the trial court, without a hearing, and affirmed on appeal by the court below.

IV

As construed by the court below, the trial court's rules for taxing costs contain unrestricted power to enter judgments, in any amount, without a hearing.

CONCLUSION

Therefore, Petitioners pray that the Petition for Writ of Certiorari be granted and that the judgment below be reversed.

Respectfully submitted,

ELLSWORTH T. SIMPSON
Bowen Building - Suite 500
815 Fifteenth Street, N.W.
(202) 393-2244

Attorney for Petitioners

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 13109

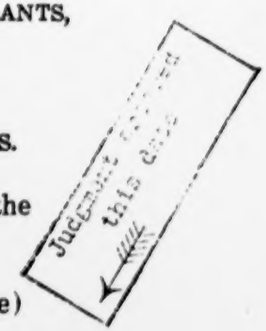
CLARENCE H. BENNETT, ET AL., APPELLANTS,

v.

GILBERT KIGGINS, ET AL., APPELLEES.

Appeal from the Superior Court of the District of Columbia

(Hon. Paul F. McArdle, Trial Judge)



(Submitted August 1, 1978 Decided August 10, 1978)

Ellsworth T. Simpson was on the brief for appellants.

Gail Starling Marshall and *Weldon H. Latham* were on the brief for appellees.

Before YEAGLEY, HARRIS and FERREN,* *Associate Judges.*

PER CURIAM: Appeal is taken from the December 12, 1977 denial of appellants' Motion for Relief from Judgment. The relief sought by appellants (plaintiffs below) was avoidance of the requirement that they pay appellees (defendants below) court costs of $740.25. Ap-

* Associate Judge Ferren did not participate in the disposition of this case.

pellees incurred this expense in making copies of depositions taken by appellants.

The underlying case, a suit for fraudulent misrepresentation, was resolved by a summary judgment order entered on August 18, 1975, in appellees' favor. Included in the order was a direction that all costs be assessed against appellants. In October 1975, appellees filed with the Clerk of the Superior Court a Certificate of Service and Notice of Appearance before the Clerk, with an attached Bill of Costs. The certificate notified appellants that costs would be taxed as permitted by Super. Ct. Civ. R. 54(d). The Clerk advised, however, that because appellants had filed a notice of appeal, the actual taxing would await disposition of the appeal. We ultimately upheld the trial court's order. *Bennett v. Kiggins*, D.C.App., 377 A.2d 57 (1977).

Following disposition of the appeal, appellees requested, on three occasions in October 1977, that appellants pay the costs assessed against them. Each request was in writing and accompanied by a copy of the Bill of Costs. Appellants refused to pay, and moved for relief from that part of the judgment which required them to do so. The trial court denied the motion without a hearing.

Appellants urge three grounds for reversal, each of which we reject. The primary thrust of appellants' argument is that copies of depositions have never been construed as taxable costs within the meaning of Super. Ct. Civ. R. 54-I(b).[1] The simple answer is that Rule 54-I(b) does not distinguish between copies and originals, and by its plain language commits such a determination to the discretion of the trial court. Indeed, federal appellate

[1] This rule provides: "Costs of depositions . . . may be taxed at the discretion of the trial court."

courts have upheld the taxing of copying costs. *Mikel v. Kerr*, 499 F.2d 1178 (10th Cir. 1974); *United States v. Kolesar*, 313 F.2d 835 (5th Cir. 1963). In *Kolesar*, the court held that the cost of copies was taxable if the trial court determined that "all or any part of a copy of any or all depositions was necessarily obtained for use in the case." 313 F.2d at 840. Appellants attempt to distinguish *Kolesar* by arguing that there, copies of the depositions were used at trial for the purpose of cross-examination, while in the instant case the copies were not so utilized. This distinction is irrelevant; it is not actual use at trial but necessity to the preparation of one's case that is dispositive. Here, the trial court must have determined that copies of the depositions aided appellees in pursuing the summary judgment order which disposed of this case at the trial level. It was not an abuse of the trial court's discretion to do so.

Appellants contend next that they were not afforded one day's notice for taxing of costs, as is required by Super. Ct. Civ. R. 54(d). Although it is difficult to ascertain from the record on appeal whether the one-day notice requirement was complied with, it is frivolous for appellants to assert that they were not adequately notified of the imminent taxing of costs. The record includes ample communication with respect to this matter between counsel for both sides. Indeed, two years passed from October 1975, when the first notice of taxing was given, until October 1977, when, following disposition of the appeal, the trial court approved the Bill of Costs. We reject this contention.

Appellants contend finally, and somewhat incoherently, that they were denied due process of law because they were not afforded a hearing prior to the trial court's taxing of the costs which are the subject of this appeal.

The record reflects, as appellees suggest, that the two years between appellants' receipt of the first taxing notice and the trial court's ultimate approval of the Bill of Costs afforded appellants considerable, albeit wasted, opportunity to address this issue. They cannot be heard to realistically complain now. Accordingly, the trial court's denial of the Motion for Relief from Judgment is

Affirmed.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

613 G Street, N.W., Fourth Floor Washington, D. C. 20001

CLARENCE H. BENNETT et al VS. GILBERT KIGGINS et al

No. CA 7314-74

CERTIFICATE

I hereby certify that on December 12, 1977, the following entry was docketed: "This matter is before the Court on the plaintiffs' Motion for relief from Judgment and the defendants opposition thereto, and the Court having read the pleadings on file and being fully advised in the premises, it is this 29th day of November, 1977, ORDERED that the said Motion be and the same is hereby denied."

JUDGE PAUL F. McARDLE

WITNESS the Honorable Chief Judge of said Court, this 5th day of January, 1978

JOSEPH M. BURTON, *Clerk*

By _____ *Deputy Clerk*

ARTHUR D. SANDERS

P-750

APPENDIX C

HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006

October 4, 1977

Ellsworth T. Simpson
Suite 500
815 15th Street, N.W.
Washington, D.C. 20005

Re: *Bennett, et al. v. Kiggens, et al.*

Dear Mr. Simpson:

As you know recoverable costs to my client taxed to your client in this matter come to $740.25.

I would appreciate your forwarding your client's check for this amount at your earliest possible convenience.

Sincerely,

Gail Starling Marshall

GSM/fph

APPENDIX D

October 13, 1977

Gail Starling Marshall, Esq.
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Re: *Bennett, et al. v. Kiggens, et al.*

Dear Mrs. Marshall:

Your letter dated October 4, 1977 relative to the above-captioned is hereby acknowledged. Kindly forward an itemization of your client's costs indicating the nature of each expenditure.

As you know, the time for petitioning for a Writ of Certiorari has not expired.

Sincerely,

Ellsworth T. Simpson

ETS:kr

October 20, 1977

Gail Starling Marshall, Esq.
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Re: *Bennett, et al. v. Kiggens, et al.*

Dear Ms. Marshall:

Your letter dated October 17, 1977 enclosing copy of bill of Defendant's costs is acknowledged.

Although the sum of $740.25 purportedly represents costs *incident* to taking depositions, you neglected to itemize the amounts comprising the sum of $740.25. Specifically, it is requested that you identify the individual deposed including the date thereof and the payee to whom such costs were remitted. By properly identifying each item, it can then be determined whether or not such costs are properly assessable against Plaintiffs.

Sincerely,

Ellsworth T. Simpson

ETS:kr

APPENDIX E

HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006

October 17, 1977

Ellsworth T. Simpson
Suite 500, Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

Re: *Bennett, et al. v. Kiggens, et al.*

Dear Mr. Simpson:

I enclose a copy of the bill of defendants' costs filed in the Court below. As you can see it is fully itemized and also is notarized.

Sincerely

Gail Starling Marshall

GSM/fph

Enclosure

BILL OF COSTS

CLARENCE H. BENNETT, et al.

vs.

GILBERT KIGGINS, et al.

Civil Action File No. CA 7314-74

Judgment having been entered in the above entitled action on the 18th day of August, 19 75, against Plaintiffs the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	$--
Fees of the marshal	--
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	--
Fees and disbursements for printing	--
Fees for witnesses (itemized on reverse side)	--
Fees for exemplification and copies of papers necessarily obtained for use in case	--
Costs incident to taking depositions	740.25
Cost as shown on Mandate of Court of Appeals	--
Other Costs (Please itemize)	
	--
	--
	--
	--
Total	$740.25

[State of New York
County of] New York } ss:

I, NORMAN R. NELSON do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed.

Norman R. Nelson

MILBANK, TWEED, HADLEY & McCLOY
Attorney for Defendants

Subscribed and sworn to before me this 25th day of September A. D. 19 75
at New York, New York

NOTARY PUBLIC, State of New York
No. 43-1504578
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires March 30, 1977

Notary Public.

Costs are hereby taxed in the amount of $ 740.25 this 19th day of October, 1977, and that amount is included in the judgment.

Clerk

By James J. Dawson
Deputy Clerk.

77-1764

NOTE: SEE REVERSE SIDE FOR AUTHORITIES ON TAXING COSTS.

Copy mailed to all counsel

APPENDIX F

APPENDIX G

HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006

October 25, 1977

Ellsworth T. Simpson
Suite 500, Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

Re: *Bennett, et al. v. Kiggens, et al.*

Dear Mr. Simpson:

I have received your letter dated October 20, 1977, regarding an itemization of the bill of costs in this case.

Although I understand this has been entered as a final judgment, therefore not making it necessary that the expenses be itemized, I am enclosing copies of the reporters' invoices.

Sincerely

Gail Starling Marshall

GSM/s

Enclosures

CERTIFIED SHORTHAND REPORTERS
NOTARIES PUBLIC

BLITZ-LORBER REPORTING CO.
15 PARK ROW
NEW YORK, N. Y. 10038
PHONE: 349-5790

No. 3294

Sept. 16, 1974

To: Andrew J. Connick,Esq.
Messrs. Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza
New York, N.Y. 10005

INVOICE

Date Reported	Copies		Title & Witness
7/31/74	1	(West & Maloney)	Bennett v Kiggins

Total: $ 122.00

*Expedited
**Daily Copy

G-2

MILBANK, TWEED, HADLEY & McCLOY

CLIENT: H&W - BENNETT, C&D v. GILBERT KIGGINS

FILE NO. 9607-78 | DATE 12-13-74

LEGAL STAFF: ATTORNEY NAME: NORMAN R. NELSON | REQUESTED BY | NON-LEGAL STAFF: NAME

THIS DATA ☐ SHOULD ☒ SHOULD NOT APPEAR ON CHECK — EXPLANATION: Taking of Deposition

EXPENSE CLASS	AMOUNT
0001 VOUCHERS	$62.50
0002 TRAVEL	
0003 BUS SUBWAY CAB FARES	
0004 TELEPHONE	
0005 TELEGRAMS	
0006 POSTAGE	
0007 XEROX	
0008 MULTILITH	
0009 OVERTIME	
0010 SECRETARY DINNERS	
0011 LAWYER DINNERS	
MISC.	
TOTAL	$62.50

RECEIVED PAYMENT:

PLEASE DRAW CHECK ON: OFFICE (UNDER $1,000), FIRM ($1,000 & OVER), TRUST, ETC. — BANK ACCOUNT: Office

TO THE ORDER OF: Katherine L. Firmin

☒ MAIL ☐ HAND } CHECK TO: Katherine L. Firmin, P.O. Box 745, Mesquite, Texas 75149

APPROVED BY: [signature] | CHECK NO. | DATE | POSTING REFERENCE NO.: 83[illegible]

SEE REVERSE SIDE | FORWARD TO: | DUPLICATING - DATE | STENOGRAPHY - DATE | ACCOUNTING - DATE

G-3

December 10, 1974

FROM: Katherine L. Firmin
Certified Court Reporter
P.O. Box 745
Mesquite, Texas 75149
Ph: 214-285-1551

TO: Mr. Andrew J. Connick
Milbank, Tweed, Hadley & McCloy
1 Chase Mahattan Plaza
New York, N.Y. 10005

RE: Civil Action No. CA 7314-74
Clarence H. Bennett, et al
vs.
Gilbert Kiggins, et al

STATEMENT:

Deposition of Mr. Glenn Moore — copy only ____ $62.50

Thank you very much.

(Original copy of Deposition of Mr. Glenn Moore enclosed for signature.)

ESPERSON BUILDING
HOUSTON, TEXAS
223-1195

INVOICE NO. 0521
A December 23, 1974

RE Clarence H. Bennett, E.
vs.
Gilbert Kiggins, Et Al

Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, New York

Attn: Mr. Andrew J. Connick

Deposition of Manro T. Oberwetter	Copy:	$32.30
		$32.30

• INDICATES TAXABLE COST

THANK YOU

CERTIFIED SHORTHAND REPORTERS
NOTARIES PUBLIC

BLITZ-LORBER REPORTING CO.
15 PARK ROW
NEW YORK, N. Y. 10038
PHONE: 349-5790

No. 3760

Apr. 7, 1975

To: Andrew J. Connick, Esq.
Messrs. Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza
New York, N.Y. 10005

INVOICE

Date Reported	Copies		Title & Witness
3/27/75	1	(Kiggins)	Bennett v. Kiggins
3/27/75	1	(Noyes, Jr.)	" "
3/27/75	1	(Bernstein)	" "
			Total: $ 58.30

G-6

*Expedited
**Daily Copy

(202) 347-9898

Stewart, Poe & Oglesby, Inc.
REPORTING SERVICES
711 FOURTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

District of Columbia, Maryland and Virginia Notaries Public

To: Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza
New York, New York

Date: 5/19/75

In remitting, please refer to No. 167/75

ORDERED BY: Andrew J. Connick, Esquire

TERMS: Net 30 Days

G-7

TRANSCRIPT

IN THE MATTER OF: Bennett, et al. v. Kiggins, et al., CA# 7314-74

HEARING DATE	DESCRIPTION	NO. OF COPIES	NO. OF PAGES	RATE	AMOUNT
1975 May 7	Deposition of Robert H. Menzel	1 CC	34	.85	$28.90
		Postage			.50
				Total	$29.40

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IN THE MATTER OF: Clarence H. Bennett, et al., v. Gilbert Kiggins, et al., CA #74-616

G-8

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APPENDIX H

IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

CLARENCE H. BENNETT, et al.,

Plaintiffs,

v.

GILBERT KIGGINS, et al.,

Defendants.

Civil Action No. CA 7314-74
Paul F. McArdle, Judge
Civil 1

MOTION FOR RELIEF FROM JUDGMENT

Plaintiffs, Clarance H. Bennett, et al, pursuant to Rule 60(b) of the Rules of the Superior Court of the District of Columbia, move for an Order granting relief from judgment for costs entered on the 19th day of October, 1977 in the amount of $740.25 and, as grounds therefor, state as follows:

1. On the 19th day of October, 1977, Defendant obtained a Judgment for Costs against Plaintiffs in the amount of $740.25 representing costs incident to taking depositions

as reflected in the Bill of Costs, a photocopy of which is attached hereto as Exhibit "A."

2. On October 4, 1977, Gail Starling Marshall, Defendant's attorney, addressed a communication to Plaintiffs' counsel advising that costs to her client taxed to Plaintiffs "come to $740.25." A photocopy of this letter is attached as Exhibit "B."

3. On October 13, 1977, Plaintiffs' counsel addressed a letter to Gail Starling Marshall, Defendants' counsel, requesting an itemization of her clients' costs indicating therein the nature of each expenditure. A photocopy of this letter is attached hereto as Exhibit "C."

4. By letter dated October 17, 1977, Defendants' counsel forwarded to Plaintiffs' counsel a copy of Defendants' costs as filed in the Court below advising that it is "fully itemized and also notarized." A photocopy of this letter is attached hereto as Exhibit "D" and a photocopy of said Bill of Costs has been previously attached hereto as Exhibit "A."

5. By letter dated October 20, 1977, Plaintiffs' counsel addressed a letter to Defendants' counsel requesting specific information regarding the taking of the depositions including the identity of the persons deposed. (Exh. "E")

6. By letter dated October 25, 1977, Defendants' counsel forwarded to Plaintiffs' counsel photocopies of various invoices rendered by court reporters, as indicated, reflecting costs for supplying *copies* of depositions to Defendants' counsel. A photocopy of this letter is attached hereto as Exhibit "F." Photocopies of the invoices are attached hereto as Exhibit "G" 1-8.

7. The grounds upon which this Motion is predicated is that the cost of obtaining *copies* of depositions are not properly taxable as costs in favor of the prevailing party.

8. Pursuant to Rule 12-I(e) of the Court's Rules, a

Memorandum of Points and Authorities in support of the within Motion is attached hereto.

Respectfully,

Ellsworth T. Simpson, Esq.
Attorney for Plaintiffs
Bowen Building—Suite 500
815 15th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 393-2244

IN THE SUPERIOR COURT

FOR THE DISTRICT OF COLUMBIA

Civil Division

CLARENCE H. BENNETT, et al.,

Plaintiffs,

v.

GILBERT KIGGINS, et al.,

Defendants.

Civil Action No. CA 7314-74

Paul F. McArdle, Judge

Civil 1

MEMORANDUM OF POINTS AND AUTHORITIES

Statement of Facts

On October 19, 1977, Defendants, as prevailing party, obtained a Judgment for Costs against Plaintiffs in the amount of $704.25 representing cost of *copies* of depositions, the originals of which were timely filed by Plaintiffs in the Office of the Clerk of this Court.

Law Involved

Where originals of depositions are on file in the Office of the Clerk of the Court, copies obtained by the prevailing party from a private court reporter are for its own convenience and not because (such copies) were necessary for use in the case. *Fleischer* v. *A.A.P., Inc.,* (SD NY 1964) 36 FRD 31, 9 FR Serv2d 26a.71, Case 2.

Cost of copies of depositions obtained for counsel's use as distinguished from costs of original deposition is not taxable as costs. *Firtag* v. *Gendleman* (D DC 1957) 152 F. Supp. 226, 24 FR Serv 54d.143, Case 3. "Where the original depositions are filed, costs of copies thereof may not be taxed." *Oscar Gruss & Son* v. *Lumbermans Mutual Casualty Co.* U.S.D.C. SD NY (1969) 46 F.R.D. 635; *Modick* v. *Carvel Stores of New York,* 209 Fed. Supp. 301. "Cost of taking plaintiff's deposition made for the convenience of Defendant's counsel must be borne by the Defendant. It cannot be included in his Bill of Costs because that deposition was obviously a discovery deposition for Defendant's benefit. The deposition was never filed with the District Court." *Johnson* v. *Furgeson* 489 P.2d 1032, Supreme Ct. of Montana (1971). To the same effect, *Electronics Speciality Co.* v. *International Controls Corp.,* 47 F.R.D. 158 (1969); *Bowman* v. *West Disenfecting Co.,* 25 F.R.D. 280; *Emerson* v. *National Cylinder Gas Co.,* 147 Fed. Supp. 543.

In the case of *Perlman* v. *Feldman,* 116 Fed. Supp. 102, U.S.D.C., District of Conn. (1953) said, in pertinent part, ". . . with the transcript on file, all parties have a right to read it in the clerk's office. In such a case, a purchase of a copy from a stenographer by any party is obviously for his private convenience."

In the case of *General Casualty Co. of America* v. *Stanchfield* (D. Mont. 1959) 23 FRD 58, 1 FR Serv2d, 54d.12 Case 5, the court, among other things, stated, "Fees paid for copies of depositions are not ordinarily taxable since original deposition is ordinarily on file in the office of the clerk and is available for inspection by all parties and hence procurement of copies of deposition is merely for convenience."

Expenses of taking depositions denied on the basis that they are primarily for the information and convenience

of the party taking deposition and for his advantage in preparation for trial, *Hansen* v. *Bradley*, D.C. Md., 114 Fed. Supp. 382; in accord, *Anderson* v. *Clear Ridge Aviation, Inc.* (D.C. Nev.) 9 F.R.D. 50.

CONCLUSION

Inasmuch as the costs claimed by Defendants and taxed against Plaintiffs represent costs for copies of deposition and inasmuch as Defendants failed to file the depositions of either Mr. Clarence H. Bennett or Dorothy G. Bennett, the costs as claimed by Defendants and as reflected in the Judgment for Costs have been erroneously taxed to the Plaintiffs.

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